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No. 05-705

In the Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
PETITIONER

v.

METROPHONES TELECOMMUNICATIONS, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Federal Communications Commission (FCC) reasonably concluded that a common carrier's failure to pay compensation for dial-around calls made from payphones, as required by FCC rules and orders adopted pursuant to a specific statutory directive, is an "unjust and unreasonable" practice that violates Section 201(b) of the Communications Act of 1934, 47 U.S.C. 201(b).

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INTEREST OF THE UNITED STATES

Under rules promulgated by the Federal Communications Commission (FCC), an interexchange carrier (IXC) must pay a payphone service provider (PSP) for each completed "dial-around" call made to the IXC's long-distance access lines using the PSP's payphones. This case presents the question whether an IXC's failure to pay compensation to the PSP as required by the Commission's rules is an "unjust or unreasonable" practice in violation of 47 U.S.C. 201(b), and thus is actionable under provisions of the Communications Act that create a cause of action for any violation of the Act. The Commission has determined that an IXC's failure to pay does violate Section 201(b), and the validity of that determination is directly at issue in this case. Moreover, the government has a strong interest in the construction of the Act's substantive and remedial provisions at issue here.

STATEMENT

1. a. In the 1980s, technological developments made it possible for independent PSPs to enter the payphone market, which had historically been limited to local exchange carriers (LECs). *Implementation of the Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996, Notice of Proposed Rulemaking*, 11 F.C.C.R. 6716, 6719-6720 (1996) (*1996 Payphone Notice*). Although payphone service provided by LECs was not a revenue center and, indeed, was partially subsidized by other ratepayers, *id.* at 6718, an independent PSP had two principal sources of revenue: coins deposited by a caller making a local call, and commissions paid by the default long distance carrier selected by the PSP to service its payphones unless the caller took affirmative steps to "dial around" that carrier by entering an access code or an 800 number. *Id.* at 6721, 6728 n.64.

The PSP receives neither type of revenue from coinless, dial-around calls. In order to protect their revenue base, therefore, some PSPs began to block such calls, which led to widespread consumer complaints. *1996 Payphone Notice*, 11 F.C.C.R. at 6721-6722. In response to those complaints, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), Pub. L. No. 101-435, 104 Stat. 986 (47 U.S.C. 226). That Act prohibits PSPs from blocking dial-around calls, thus ensuring that a caller can use any long distance carrier. 47 U.S.C. 226(c)(1)(B). Congress also directed the FCC to consider the need to prescribe compensation for "calls routed to providers * * * other than the presubscribed provider" of long distance services, so long as it did not prescribe "advance payment by consumers." 47 U.S.C. 226(e)(2). The FCC accordingly instituted a flat-rate, per-phone compensation plan, under which long-distance carriers would pay PSPs in proportion to their share of overall

industry revenue. *Policies & Rules Concerning Operator Serv. Access & Pay Tel. Compensation, Second Report & Order*, 7 F.C.C.R. 3251, 3255-3259 (1992).

b. In the Telecommunications Act of 1996, Pub. L. No. 104-104, § 151, 110 Stat. 106, Congress revised payphone service regulation, directing the Commission to "take all actions necessary" to "discontinue * * * all intrastate and interstate payphone subsidies * * * in favor of a compensation plan" under which "all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. 276(b)(1)(A) and (B). The Commission implemented Section 276 by rulemaking. *Implementation of the Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996*, 11 F.C.C.R. 20,541 (1996) (*1996 Payphone Order*), on reconsideration, 11 F.C.C.R. 21,233 (1996), aff'd in part *sub nom. Illinois Pub. Telecomms. Ass'n* v. *FCC*, 117 F.3d 555 (D.C. Cir. 1997), cert. denied, 523 U.S. 1046 (1998). To assure compensation for coinless calls, the Commission adopted a "carrier pays" system, under which the PSP would be compensated directly by the "primary economic beneficiary" of each call, namely, the IXC that completed the call. *1996 Payphone Order*, 11 F.C.C.R. at 20,584, 20,596.

The payphone rules, including the "carrier pays" approach, were largely affirmed by the court of appeals, but the court struck down some aspects of the regulations, including the per-call rate that was to apply in the absence of an agreement between the PSP and IXC. *Illinois Pub. Telecomms. Ass'n* v. *FCC*, 117 F.3d 555, 563-564 (D.C. Cir. 1997), cert. denied, 523 U.S. 1046 (1998). The Commission then set a per-call default rate that was affirmed in *American Public Communications Council* v. *FCC*, 215 F.3d 51 (D.C. Cir. 2000). In sustaining the rate, the court rejected a claim by PSPs that the Commission erred in failing to include an amount to ac-

count for bad debts, relying in part on the argument that no bad debt component was needed because a "[f]ailure to pay the required compensation is a violation of FCC rules for which the carrier is subject to damages" under 47 U.S.C. 206-208. *American Pub. Comme'ns Council*, 215 F.3d at 56. That argument had been raised by long distance carriers, including petitioner's amici in this Court and Frontier Corporation, a firm that petitioner has since acquired.

Shortly before the court affirmed the per-call rate, PSPs reported that they were often unable to collect the money to which they were entitled when a call was handled by more than one IXC (in that situation, the second IXC is known as a reseller). For calls involving multiple IXCs, the rules at the time put payment responsibility on an IXC that had its own switching equipment, known as a "switch-based reseller." PSPs urged the FCC to place responsibility for payment instead on the first IXC to which a call was delivered. IXCs argued in response that PSPs must "resort to the usual collection remedies against [switch-based resellers] to enforce their rights." Frontier Corp. Cmts. at 4 (filed May 17, 1999). In 2001, the Commission changed the compensation rules to make the first IXC responsible for payment. *Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996, Second Order on Reconsideration*, 16 F.C.C.R. 8098 (2001). The D.C. Circuit reversed that determination on procedural grounds. *Sprint Corp.* v. *FCC*, 315 F.3d 369 (2003).

On remand, the Commission sought comment on which of multiple IXCs involved in a call should be responsible for payment and, *inter alia*, on "whether PSPs have access to adequate avenues of relief in instances where our PSP compensation rules are violated." *Implementation of the Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996*, 18 F.C.C.R. 11,003, 11,012 ¶ 19 (2003) (*2003 NPRM*). The Commission decided, consistent with the ap-

proach of its earlier rule, that the switch-based reseller for the particular call at issue should be responsible for payment. *Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996*, 18 F.C.C.R. 19,975 (2003) (*2003 Payphone Order*), aff'd on reconsideration, 19 F.C.C.R. 21,457 (2004). To address the payment concerns of PSPs, the Commission required that IXCs report to PSPs all calls directed to switch-based resellers. *Id.* at 19,994. It also ruled that an IXC's "failure to pay * * * constitutes both a violation of section 276 and an unjust and unreasonable practice in violation of section 201(b) of the [Communications] Act." *Id.* at 19,990 ¶ 32.

2. In 2001, respondent filed suit in the United States District Court for the Western District of Washington against petitioner and other IXCs, alleging a failure to pay the full amount of dial-around compensation due under the FCC's rules, in violation of Section 276. In 2003, however, before the Commission adopted the *2003 Payphone Order*, the Ninth Circuit decided in *Greene* v. *Sprint Communications Co.*, 340 F.3d 1047 (2003), cert. denied, 541 U.S. 988 (2004), that Section 276 did not create a private right of action for PSPs. The district court accordingly dismissed the claim under Section 276, but it allowed respondent to amend its complaint to state a cause of action under 47 U.S.C. 206 and 207, alleging a violation of Section 201(b). Pet. App. 53a. Section 206 makes a common carrier liable for injuries caused by "any act * * * in this chapter * * * declared to be unlawful," and Section 207 grants an express private right of action to recover damages for such injuries in district court. Section 201(b) provides that "[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. 201(b). The

district court held that the amended complaint stated a claim under Section 207. Pet. App. 51a-53a.

3. The court of appeals affirmed in relevant part. Pet. App. 1a-39a. Relying on the *2003 Payphone Order*, the court held that "[u]nder the FCC's interpretation, the failure to pay compensation * * * is actionable in federal district court pursuant to §§ 206 and 207." *Id.* at 9a. Under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court deferred to the Commission's determination in the *2003 Payphone Order* that a failure to pay compensation was an unjust and unreasonable practice that violated Section 201(b). Pet. App. 9a.

The Ninth Circuit disagreed with an earlier decision of the D.C. Circuit that had held that PSPs did not have a private right of action for failure to pay dial-around compensation. *APCC Servs., Inc.* v. *Sprint Commc'ns Co.*, 418 F.3d 1238 (D.C. Cir. 2005), petition for cert. pending, No. 05-766 (filed Dec. 12, 2005). The D.C. Circuit had held that because the FCC in *Implementation of the Pay Tel. Reclassification & Compensation Provisions of the Telecomms. Act of 1996*, 14 F.C.C.R. 2545 (1999) *(1999 Payphone Order)* "said not a word about § 201(b)," the Commission had never "specified that a carrier's failure to pay was of th[e] magnitude" of an unjust and unreasonable act. 418 F.3d at 1247, 1248. While the court "d[id] not say that the Commission has no power to interpret § 201(b) to encompass violations of its rules, and thereby to create private rights of action in courts when previously there were none," it found that the Commission had not "attempt[ed] to exercise any such power." *Id.* at 1248. In so holding, however, the D.C. Circuit failed to mention the Commission's explicit determination in the *2003 Payphone Order* that failure to pay would constitute a violation of Section 201(b). Indeed, Chief Judge Ginsburg dissented on the ground that the majority reached its result only by ignoring the *2003 Payphone Order*. He "disagree[d] that the Commission has not

exercised its interpretive authority in this case." *Id.* at 1254 (Ginsburg, C.J., dissenting). The Ninth Circuit likewise "disagree[d] with the majority's opinion in [*APCC Services*] and * * * adopt[ed] the position of the dissenting judge." Pet. App. 13a n.5.

SUMMARY OF ARGUMENT

Section 206 of the Communications Act (47 U.S.C. 206) makes carriers liable for any violation of the Act, and Section 207 (47 U.S.C. 207) expressly authorizes parties damaged by such violations to bring suit in federal court. Respondent is thus entitled to bring this action under Section 207 if petitioner's failure to pay it compensation would violate the Act.

Petitioner's failure to pay violates Section 201(b) of the Act, which prohibits "practice[s]" by common carriers "in connection with" "interstate or foreign communication" that are "unjust or unreasonable." 47 U.S.C. 201(a) and (b). Under the ordinary meanings of those terms, an IXC's repeated failure to pay compensation to a PSP for dial-around calls is a "practice," and it is undertaken "in connection with" "interstate or foreign communication" (at least insofar as the call goes beyond a State's borders). It is also "unjust or unreasonable." Congress itself determined that PSPs should be "fairly compensated for each and every completed * * * call." 47 U.S.C. 276(b)(1)(A). The FCC, having concluded that the IXC should be the payor, acted reasonably in concluding that the IXC's failure to "fairly compensate[]" the PSP under Section 276 is "unjust or unreasonable" and therefore violates Section 201(b).

Petitioner contends that the FCC's determination is not entitled to deference because it was simply a ruling on a matter—the availability of a private right of action—entrusted to the courts. Congress, however, not the Commission, created the cause of action (and the coextensive administrative rem-

edy) for violations of the Act in Sections 206-208 (47 U.S.C. 206-208). The Commission's determination in this case does not construe those remedial provisions of the Act, but instead construes a core substantive provision of the Act (Section 201(b)) whose deliberately broad terms leave it particularly open to agency elaboration. There is no basis for declining to apply the normal principles of deference to the Commission's determination merely because the consequence of that substantive determination is that respondent has a remedy for the violation in federal court (and before the FCC itself) under the remedial scheme embodied in Sections 206-208. And because the Commission's determination was adopted formally, after notice-and-comment rulemaking, and was an integral element of its development of rules for ensuring compensation of PSPs in accordance with Congress's direction, petitioner's argument that the Commission's determination was not the product of sufficient deliberation is mistaken.

Petitioner's other attacks on the Commission's determination are also without merit. Petitioner argues that, because Section 276(b) does not itself identify who must pay compensation to PSPs, the failure of the IXC to pay such compensation does not violate the Act. But the statute's ambiguity on this point empowers, rather than restricts, the FCC. Section 276(b)(1)(A), moreover, makes clear that PSPs must receive compensation, and the IXC is the most likely candidate to provide that compensation. The Commission therefore acted well within it authority in placing the payment obligation on a particular IXC. Petitioner also argues that Section 201(b) itself does not mention payphone compensation. But Section 201(b) does not mention *any* particular practice. Petitioner's crabbed view of the scope of Section 201(b) is inconsistent with longstanding judicial and administrative precedent, and it would undermine the important role of Section 201(b) in the regulatory scheme. Moreover, petitioner's argument would

call into question the ability of the FCC to enforce a PSP's right to compensation at all, as well as important rules regulating other aspects of a carrier's conduct. The Act's basic remedial provisions in Sections 206-208 make judicial and administrative remedies coextensive; if no judicial remedy lies for a failure to compensate PSPs, it is likely that no administrative remedy would lie under those provisions either.

Finally, petitioner's argument that Section 201(b) covers only relations between carriers and their customers requires reading a broad, nontextual limitation into Section 201(b) that conflicts with the Commission's consistent understanding of Section 201(b) in a variety of contexts. In *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 371-372 (1986), this Court rejected an analogous attempt by carriers to limit their liability. The substance of the relationship between the PSP and IXC in the dial-around setting is that each provides the other with a service and each is, in substance, the customer of the other. The PSP provides the IXC with access to payphone users, while the IXC provides the PSP with long-distance services for payphone users. Even under petitioner's theory, therefore, the FCC reasonably concluded that an IXC's failure to pay compensation violates Section 201(b).

ARGUMENT

I. A FAILURE TO PAY DIAL-AROUND COMPENSATION IS ACTIONABLE IN FEDERAL COURT UNDER SECTIONS 206 AND 207 OF THE COMMUNICATIONS ACT IF IT VIOLATES SECTION 201(b) OF THE ACT

1. Congress mandated that the Communications Act would be enforceable, in substantial part, through private actions in district courts. Specifically, it provided in Section 206 that if a carrier "shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or

thing in this chapter required to be done," that carrier "shall be liable" to an injured party "for the full amount of damages" caused by such violation. 47 U.S.C. 206. Congress provided further in Section 207 that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter" may choose "*either* [to] make complaint to the Commission as hereinafter provided for [in 47 U.S.C. 208], *or* * * * [to] bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction." 47 U.S.C. 207 (emphasis added). Congress thus created an express right of action for *any* person against *any* common carrier for *any* violation of the Communications Act. Petitioner errs in suggesting (Br. 18-21, 36) that this case involves an implied right of action. Congress's judgment in Section 207 is express. The only question before the Court is whether an IXC's failure to pay dial-around compensation violates any part of the Communications Act; if so, it is actionable in federal court under the express terms of Section 207.

2. In this case, the conduct at issue violates Section 201(b) of the Communications Act, 47 U.S.C. 201(b). The prior subsection, Section 201(a), requires common carriers to furnish "interstate or foreign communication by wire or radio * * * upon reasonable request therefor." 47 U.S.C. 201(a). Section 201(b) provides, in relevant part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.

47 U.S.C. 201(b). Section 201(b) thus expressly "declare[s] to be unlawful" all "practices" by common carriers "in connection with" "interstate or foreign communication" that are

"unjust or unreasonable." Under the plain terms of Sections 206 and 207, a common carrier that engages in such practices is liable for damages to an injured party in an action in federal court.

3. Although petitioner invokes *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), as a basis for rejecting a cause of action, *Alexander* in fact supports the court of appeals' holding that an action in federal court is available here. In *Alexander*, this Court held that the cause of action the Court had inferred from Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, did not extend to practices that violated only the regulatory prohibition on practices with disparate impact and not the statute's proscription of intentional discrimination. *Alexander* thus stands for the proposition that, absent a specific congressional intent to the contrary, an implied right of action under a federal statute will not be extended to conduct that does not violate the statute itself.

Even in the context of an implied right of action, however, administrative action may be crucial in assessing the scope of the statutory rights enforceable in federal court. As the Court explained in *Alexander*,

> regulations applying [the statute's] ban on intentional discrimination are covered by the cause of action to enforce [the statute]. Such regulations, if valid and reasonable, authoritatively construe the statute itself, and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.

532 U.S. at 284 (citations omitted). A cause of action for violation of a statute, even when not express, extends to all violations of the statute, including violations based on permissible

regulatory constructions of the statutory prohibitions; it would be "meaningless" to contend otherwise.

4. The same result follows *a fortiori* in the context of the *express* cause of action set forth in Sections 206 and 207, which broadly encompass *any* violation of the Communications Act by common carriers like petitioner.[1] Thus, if an IXC's failure to pay fair compensation to a PSP is an "unjust or unreasonable" practice proscribed by Section 201(b), it may be remedied in an action under Section 207. Moreover, the Commission's construction of that statutory phrase, which is hardly self-defining, can provide the basis for a Section 207 claim. Nothing in *Alexander* remotely suggests to the contrary. On the other hand, if an IXC's failure to pay fair compensation to a PSP is not an "unjust or unreasonable" practice under Section 201(b), then, unless it violates some other provision of the Act, it may not support a private action in federal court under Section 207. Indeed, no party to this proceeding has contended—and the Commission has never argued—to the contrary.

In the end, *Alexander* only bolsters the court of appeals' conclusion that a cause of action lies under Section 207 in this case. *Alexander* makes clear that, even in the context of an inferred cause of action, conduct that violates a statute only because an administrative agency had validly construed the statute to extend to that conduct falls within the statutory cause of action, no less than conduct unambiguously prohibited by the statute: "A Congress that intends the statute to

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[1] The question presented in the petition asks "[w]hether [Section 201(b)] creates a private right of action." Pet. i. Neither the PSP nor the Commission has contended that Section 201(b) creates a private right of action, however, and the court of appeals did not so hold. The sole issue in this case is whether a carrier's failure to "fairly compensate[]" a PSP, 47 U.S.C. 276(b)(1)(A), is a violation of the Communications Act. If so, the private right of action that Congress expressly created in Section 207 is clearly available.

be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well." 532 U.S. at 284. Thus, *Alexander* teaches that the Commission's valid substantive interpretation of the "just and reasonable" standard of Section 201(b) legitimately governs the contours of the cause of action expressly provided in Section 207.

II. A FAILURE TO PAY DIAL-AROUND COMPENSATION VIOLATES SECTION 201(b)

A. An IXC's Failure To Pay Compensation To A PSP Is An Unjust And Unreasonable Practice Under Section 201(b)

Section 201(b) prohibits, and expressly "declare[s] to be unlawful," all "practices" by common carriers "in connection with" "interstate or foreign communication" that are "unjust or unreasonable." 47 U.S.C. 201(a) and (b). Thus, an IXC's failure to pay compensation to a PSP violates Section 201(b) if it is a "practice[]" by a common carrier "in connection with" "interstate or foreign communication" that is "unjust or unreasonable." The court of appeals correctly held that it is.

1. Under the ordinary meanings of the terms involved, an IXC's failure to pay compensation to a PSP for dial-around calls is a "practice" by a carrier "in connection with" "interstate or foreign communication." There is no dispute that IXCs are acting as common carriers when they carry dial-around calls from payphones, and that the dial-around calls themselves, insofar as they go beyond a State's borders, are "interstate or foreign communication" provided by the IXC. Especially when, as is alleged here, an IXC has repeatedly failed to make payments to a PSP, that failure is naturally described as a "practice" that is "in connection with" such "interstate or foreign communication."

To be sure, there are limitations on what constitutes a "practice" under Section 201(b). As the court of appeals ex-

plained, "the term 'practice' must be interpreted to be consistent with the words around it—that is, it must be a practice connected 'with the fixing of rates to be charged and prescribing of service to be rendered.'" Pet. App. 16a (quoting *Missouri Pac. R.R.* v. *Norwood*, 283 U.S. 249, 257, modified, 283 U.S. 809 (1931)). Thus, the term "practice" in Section 201(b) would not extend to a carrier's employment decisions, as in *Missouri Pacific*, the method of selection of its board of directors, as in *California Independent System Operator Corp.* v. *FERC*, 372 F.3d 395, 400-402 (D.C. Cir. 2004), or its purchases of equipment from its suppliers, see AT&T Br. 6. This case, however, involves a practice (the IXC's failure to pay the PSP) that the IXC undertakes directly "in connection with" its provision of common carrier communication services under Section 201(b). Accordingly, the failure to pay that fee is a "practice" that is "in connection with" the provision of service.

2. Although the meaning of the terms involved is sufficiently clear to establish that an IXC's failure to provide fair compensation to a PSP is a "practice" "in connection with" "interstate or foreign communication," the FCC's determination in the *2003 Payphone Order* eliminates any doubt on the matter. In that order, the Commission determined that "[a] failure to pay in accordance with the Commission's payphone rules * * * constitutes * * * an unjust and unreasonable practice in violation of section 201(b) of the Act." 18 F.C.C.R. at 19,990 ¶ 32. As this Court has recently reaffirmed, "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005). Accordingly, the Commission's construction of the Act is entitled to *Chevron* deference. *Ibid.*; accord *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 377-378 (1999).

3. An IXC's failure to pay compensation to a PSP is likewise "unjust or unreasonable" within the meaning of Section 201(b). In enacting Section 276(b)(1)(A), Congress determined that it was necessary "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." 42 U.S.C. 276(b)(1)(A). It thus follows that it is "unjust or unreasonable" under the Act for the PSP not to be paid such "fair[] compensat[ion]." Although Congress left the designation of the identity of the proper payor to the agency's expert judgment, it surely understood that an IXC was the most likely candidate. As the Commission explained in 1996, there were three possible types of payment structures under Section 276(b)(1): "caller pays"; a "set use fee" approach, under which an IXC would individually bill each caller a predetermined fee for each payphone call and then remit the proceeds to the PSP; and "carrier pays," under which an IXC would simply pay PSPs directly for each call (leaving it to the IXC whether and how to collect a payphone-related fee from the caller). *1996 Payphone Order*, 11 F.C.C.R. at 20,584-20,586. Congress itself had effectively eliminated the "caller pays" approach when it prohibited the Commission from requiring "advance payment by consumers." 47 U.S.C. 226(e)(2); see *1996 Payphone Order*, 11 F.C.C.R. at 20,585 ¶ 85. Both the "set use" fee and the "carrier pays" approaches in the end required IXCs to make payments to PSPs, although they differed in their details. Congress therefore would likely have anticipated that the obligation to pay fair compensation to PSPs would ultimately fall upon IXCs, who are the "primary economic beneficiar[ies]" of long distance telephone calls. *Id.* ¶ 83. Accordingly, an IXC's failure to pay fair compensation to a PSP is readily viewed as an unjust and unreasonable practice under the Act.

In any event, the FCC has promulgated rules that eliminate any doubt about the question by requiring IXCs to compensate PSPs for long distance calls. See 47 CFR 64.1300. Those rules are not—and cannot be—challenged in this proceeding, because review of them was available solely by means of a petition for review to the court of appeals. See 28 U.S.C. 2342(1); 47 U.S.C. 401(a). In light of (a) the statutory requirement that PSPs be "fairly compensated for each and every * * * call," (b) the status of the IXC under the Act as the likely party obligated to pay compensation, and (c) the FCC's determination (which cannot be challenged here) pursuant to delegated authority that the IXC indeed should be the party providing the compensation, the FCC's additional determination that an IXC's failure to pay a PSP is an "unjust and unreasonable" practice within the meaning of Section 201(b) is a reasonable one, and it is entitled to deference.[2]

B. The Commission's Interpretation Of Section 201(b) Is Entitled To *Chevron* Deference

Petitioner argues (Br. 30) that the Commission's determination that an IXC's failure to pay compensation to a PSP is unjust and unreasonable under Section 201(b) is not entitled to deference, because it "concerns the scope of the Act's private cause of action, not substantive statutory terms," and because "it is not explained by sufficient * * * reasoning."

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[2] Petitioner errs in contending (Br. 40) that the FCC's view in this case entails the conclusion that "violating virtually any regulation respecting common carriers would violate section 201(b))." The FCC has not found that all violations of its rules by carriers constitute unjust and unreasonable practices. See, *e.g.*, *American Tel. & Tel. Co.*, 71 Rad. Reg. 2d (P&F) 775, 777 (1992) (issuing "strong admonition" to company that used improper marketing practices, but finding that carrier's conduct was not an unjust or unreasonable practice). Because an IXC's failure to pay "fair[] compensat[ion]" under Section 276 is readily viewed as "unjust or unreasonable," this case does not require demarcation of the outermost limits of the Section 201(b) "just and reasonable" standard.

Both halves of petitioner's argument are wrong. The Commission's determination reflects an interpretation of the substantive requirements of the Act in an area of core Commission expertise, and it embodies a considered exercise of discretion that was an essential part of the Commission's reasoning underlying the rules it adopted for compensating PSPs.

1. The *2003 Payphone Order* had its roots in ongoing problems in the collection of dial-around compensation and the FCC's search for ways to ensure that PSPs actually received payments due. When it set the original per-call payment rate in 1999, an important issue before the Commission was whether to add a bad-debt allowance to compensate PSPs for payments never in fact made. The Commission declined to add such an allowance, due to a lack of data available at that time. See *1999 Payphone Order*, 14 F.C.C.R. at 2618-2620 ¶¶ 160-162. The D.C. Circuit affirmed that ruling, relying in part on the availability of damages remedies under the Communications Act, which the IXCs themselves asserted were available. See *American Pub. Commc'ns Council*, 215 F.3d at 56.

When the Commission returned to the matter, the problem had not been resolved; the Commission "found that * * * PSPs have been frustrated in their efforts to receive compensation for certain coinless calls." *Second Order on Reconsideration*, 16 F.C.C.R. at 8102; see *id.* at 8102 n.22 (noting PSP reports that as much as 50% of compensation due from large IXCs was not being paid). The PSPs proposed that the FCC change the payment rules to make it easier for them to collect dial-around compensation for calls handled by more than one IXC. *Id.* at 8099 n.1. The IXCs responded, in part, by arguing that the Commission should not change the rules, but that PSPs should "resort to the usual collection remedies" against IXCs. Frontier Corp. Cmts. at 4 (May 17, 1999); see Qwest Comm'ns Corp. Cmts. at 7 (May 17, 1999) ("PSPs that are

unable to collect payments * * * may use the Commission's enforcement mechanisms to stake their claim."). The Commission did not directly address the collection problem, but modified its rules governing which IXC was responsible for payment when more than one IXC handled a call. 16 F.C.C.R. at 8104-8108. The Commission placed payment responsibility on the first IXC, which might facilitate collection efforts.

The modified rules were vacated for failure of adequate notice. *Sprint*, *supra*. On remand, the FCC's determination to return to the rule that the switch-based reseller, rather than the first IXC, should pay the PSP for calls involving multiple IXCs was subject to the objection that the PSP would be better able to collect from the first IXC to receive the call. The FCC, however, determined that its rules would be adequate to protect the fair-compensation rights of PSPs, based in part on its conclusion that a failure to pay is "an unjust and unreasonable practice in violation of section 201(b) of the Act." *2003 Payphone Order*, 18 F.C.C.R. at 19,990 ¶ 32.

That procedural history demonstrates that the problem of IXC non-payment was central to the Commission's action. The Commission's determination that an IXC's failure to pay fair compensation would constitute an unjust and unreasonable practice was an integral part of its justification for adopting the compensation scheme urged by the IXCs themselves, rather than the first-IXC rule favored by the PSPs. As the court of appeals put it, "it is apparent that the Commission considered the ability of PSPs to recover compensation for dial-around calls in private actions to be integral to the proper functioning of the payphone compensation system." Pet. App. 11a. "[I]n adopting the final rules in the *2003 Payphone Order*, the Commission relied on the availability of actions for damages under §§ 206 and 207." *Id.* at 13a.

2. Petitioner argues (Br. 30) that the Commission's determination is due no deference because the agency did not inter-

pret the "substantive statutory terms" of the Communications Act, but instead merely "opine[d] respecting the presence of federal judicial power to provide remedies." Petitioner is incorrect. As the foregoing discussion makes clear, the *2003 Payphone Order* includes a substantive determination about the scope of Section 201(b)'s express prohibition of unjust and unreasonable carrier conduct, just as prior FCC decisions concluding that it would be unreasonable for carriers to engage in conduct ranging from the failure to obey merger conditions, to slamming, to blocking access to IXCs from payphones were substantive determinations about permissible carrier conduct under the Act. See p. 24, *infra*. The fact that the Commission recognized the remedial consequences of its substantive determination does not alter the nature of the Commission's decision.

The Commission did not purport to recognize a new cause of action or delimit the scope of judicial power; Congress did that when it provided a federal judicial, as well as administrative, remedy for any breach of the Communications Act, including a violation of Section 201(b). But Congress delegated to the FCC the authority to exercise its expertise to decide which acts of carriers were unjust and unreasonable in this, as in other, areas under Section 201(b), and the Commission exercised that authority in the *2003 Payphone Order*.[3] Petitioner's contrary argument would mean that the FCC could *never* receive deference in construing the substantive obligations of common carriers under the Communications Act, be-

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[3] For that reason, petitioner's reliance on *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990), is misplaced. There, the Court found that the statute at issue was not ambiguous on the relevant point, and the agency's ruling to which the Court declined to defer explicitly addressed the availability of a judicial remedy, rather than the meaning of the statute's substantive requirements. *Adams Fruit* has no bearing here, where the statute is ambiguous and the agency's ruling defines the substantive scope of the statute's prohibitions.

cause all such obligations are judicially enforceable under Section 207. Merely to state that proposition is to refute it.

3. Petitioner also contends (Br. 33) that the *2003 Payphone Order* merits no deference because it "was not the product of sufficient deliberation or explanation." This Court has never refused to grant *Chevron* deference to an agency's interpretation of a statute merely because the agency has not explained its rationale in great detail, when the agency has responsibility to administer the statutory program and has formally adopted that interpretation. And in any event, as the procedural history of the *2003 Payphone Order* makes clear, the FCC's ongoing efforts to ensure that PSPs are able to collect the money they are owed, which culminated in that order, reflect extensive consideration and deliberation by the agency. See Pet. App. 11a. The Commission had specifically invited comment on "whether PSPs have access to adequate avenues of relief in instances where [the] PSP compensation rules are violated." *2003 NPRM*, 18 F.C.C.R. at 11,012 ¶ 19. And IXCs had informed both the court of appeals and the agency that the Commission's compensation rules need not be modified in favor of PSPs to ensure payment of bad debts precisely because PSPs had the ability to pursue collection actions against defaulting IXCs by the usual means, *i.e.*, complaints filed with the Commission or the courts. See pp. 17-18, *supra*. Thus, contrary to petitioner's assertion (Br. 33), the Commission sought comment on the matter, the parties' comments had addressed the issue, and the Commission considered and resolved it in the course of establishing the rules for PSP compensation.

Insofar as petitioner's complaint is that the Commission did not elaborate at great length on its conclusion, extensive discussion was not necessary to explain that it is not "just and reasonable" under Section 201(b) for an IXC to fail to provide "fair[] compensat[ion]" to a PSP. 47 U.S.C. 276(b)(1)(A). Cf.

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (on review of administrative action, Court "will * * * 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned'") (citation omitted). Moreover, the Commission did elaborate further in amicus briefs submitted to the Ninth Circuit in this case and to the D.C. Circuit in *APCC Services*. See *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (granting *Chevron* deference to position taken by agency *only* in amicus brief where "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question"). The Commission satisfied any applicable burden of explanation, and its considered decision is entitled to deference.[4]

C. The Absence Of An Express Reference To Payphone Compensation In Section 201(b) Does Not Preclude A Determination That The Failure To Pay Such Compensation Is Unjust And Unreasonable

Petitioner argues (Br. 26) that, because the statutes that do mention payment of compensation (such as Section 276) "have never suggested a right or wrong way of compensating [PSPs]," and because Section 201(b) itself "does not even mention payphone compensation," Section 201(b) "cannot be read indirectly to impose requirements that Congress explicitly declined to impose directly." Petitioner is mistaken.

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[4] If the Court were to conclude that the *2003 Payphone Order* is not entitled to *Chevron* deference, it should nonetheless hold, for the reasons explained in this brief, that a failure to pay dial-around compensation is an unjust and unreasonable act that violates Section 201(b), and affirm the court of appeals' judgment on that ground. See *United States* v. *Mead Corp.*, 533 U.S. 218 (2001). And if the Court were disinclined to reach that result in the absence of further authoritative guidance from the Commission, a referral for the Commission to exercise its primary jurisdiction would be appropriate.

1. As noted above, petitioner's first premise is incorrect. Section 276's prescription that PSPs must be compensated for "each and every completed * * * call," read against Congress's effective preclusion of a "caller pays" system elsewhere in the Act, is most reasonably understood to suggest that the "right * * * way of compensating" PSPs must involve payment by an IXC to the PSP. Congress did leave the details of the PSP compensation system to the FCC, and in that sense it did not directly impose the requirement that the IXC pay. But that delegation of authority to the FCC *supports* the conclusion that the FCC has authority to fill in the content of the "just and reasonable" standard as it applies to payphone compensation. Petitioner argues, in effect, that by expressly delegating to the FCC the authority to regulate payphone compensation, Congress somehow *disabled* the FCC from filling in the content of the general "just and reasonable" standard as applied to that subject matter. Petitioner has things exactly backward, and its argument should be rejected.

2. In any event, petitioner's second premise—that a failure to pay dial-around compensation cannot violate Section 201(b) because "[n]othing in the language of [Section 201(b)] itself requires long distance carriers to compensate payphone service providers for coinless calls," Pet. Br. 20—is also mistaken. Nothing in the language of Section 201(b) itself addresses *any* specific acts. Instead, Section 201(b) refers generally to "*[a]ll* charges, practices, classifications, and regulations." 47 U.S.C. 201(b)(1) (emphasis added). That broad statutory sweep straightforwardly expresses Congress's intent to ensure that *all* such conduct by carriers in connection with interstate service will be subject to regulation, without the need for enumeration of individual practices. Telecommunications regulation is extraordinarily complex and continuously changing, and it would have been impossible for Congress to have specified every practice that ran afoul of

Section 201(b). Congress chose instead to give the Commission wide latitude to determine which practices subject to regulation are "unjust or unreasonable," terms that clearly grant discretion. Petitioner's contrary approach is fundamentally inconsistent with Congress's scheme.

a. The courts of appeals and the Commission have repeatedly rejected petitioner's crabbed view of Section 201(b). In *MCI Telecommunications Corp.* v. *FCC*, 59 F.3d 1407 (D.C. Cir. 1995), cert. dismissed, 517 U.S. 1129 and cert. denied, 517 U.S. 1240 (1996), an IXC filed a complaint alleging that several local exchange carriers (LECs) had exceeded rate-of-return limits that the Commission had adopted under Section 201(b). Much like petitioner here, the LECs argued that because Section 201(b) itself does not mandate any particular rate or rate-of-return limit, the violation of FCC-prescribed limits does not constitute a violation of the Act and cannot serve as the basis for liability. 59 F.3d at 1413. The court rejected the argument, on the ground that a violation of an FCC-prescribed just and reasonable rate was a violation of Section 201(b) itself. *Id.* at 1414.

The Commission has likewise determined that a carrier's practice may be unreasonable within the meaning of Section 201(b) even though the practice itself is not expressly addressed in statutory language. In the *1996 Payphone Order*, for example, the Commission determined that "undue coercion of location providers with respect to their choice of [IXC] for payphones on their premises may be found unjust and unreasonable" in violation of Section 201(b). 11 F.C.C.R. at 20,666 ¶ 252. See, *e.g.*, *TRAC Commc'ns, Inc.* v. *Detroit Cellular Tel. Co.*, 5 F.C.C.R. 4647 (1990) (violation of FCC policy requiring cellular carrier to allow resale of service was unjust and unreasonable); *Competitive Telecomms. Ass'n*, 4 F.C.C.R. 5364 (Common Carrier Bureau 1989) (call blocking, pre-TOCSIA, was unjust and unreasonable).

Petitioner's narrow reading of Section 201(b) would seriously undermine the FCC's enforcement authority. The Commission oversees a vast area of carrier practices in numerous lines of business. As the foregoing examples show, the Commission must have the flexibility to police carrier behavior regarding that entire, and constantly changing, range of activities. In recent years, the Commission has found that the "just and reasonable" standard of Section 201(b) is violated by conduct ranging from "slamming" (*i.e.*, the unauthorized switching of telephone carriers), *NOS Commc'ns Inc.*, 18 F.C.C.R. 6952 (2003), to the negligent disconnection of telephone numbers, *Staton Holdings, Inc.* v. *MCI WorldCom Commc'ns, Inc.*, 19 F.C.C.R. 8699 (Enforcement Bureau 2004), to unreasonable directory assistance practices, *Himmelman* v. *MCI Commc'ns Corp.*, 17 F.C.C.R. 5504 (2002), to charging customers for rejected collect calls, *ASC Telecom, Inc.*, 17 F.C.C.R. 18,654, 18,656 n.18 (2002). Section 201(b), of course, does not expressly mention any of those matters, and petitioner's view that Section 201(b) can reach only conduct that is expressly mentioned in that provision would transform it from a valuable tool for the Commission's policing of carrier activity into an essentially useless irrelevancy.

b. Petitioner's argument would also significantly inhibit, if not eliminate, the administrative complaint process in many cases. In Section 207, Congress provided that "[a]ny person claiming to be damaged by any common carrier * * * may *either* make complaint to the Commission as hereinafter provided for, *or* may bring suit for the recovery of the damages for which such common carrier may be liable." 47 U.S.C. 207 (emphasis added). Congress thus chose to make the judicial and administrative remedies under the Communications Act coextensive, giving the complainant the option to seek damages (as defined by Section 206) either in federal court or at

the FCC.[5] If, as petitioner contends, Section 207 does not give PSPs a cause of action for damages in federal court, it is difficult to see how it could permit such a remedy at the FCC.

As the foregoing discussion shows, moreover, petitioner's approach could have effects in regulatory areas far beyond payphone compensation disputes and has the potential to restrict dramatically private enforcement of the Communications Act. See p. 24, *supra* (listing examples of Commission determinations of unjust and unreasonable practices); see also *Telephone Number Portability*, 18 F.C.C.R. 23,697, 23,709 n.76 (2003) (noting that "a violation of [FCC's] number portability rules would constitute an unjust and unreasonable practice under section 201(b) of the Act"); *Business Disc. Plan, Inc.*, 15 F.C.C.R. 24,396 (2000) (deceptive marketing practices violate Section 201(b)); *WATS Int'l Corp.* v. *Group Long Distance (USA), Inc.*, 11 F.C.C.R. 3720, 3728-3729 (Common Carrier Bureau 1995) (failure to inform customer of change in long distance carrier is unjust and unreasonable under Section 201(b)); see also *Core Commc'ns, Inc.* v. *SBC Commc'ns, Inc.*, 18 F.C.C.R. 7568, 7578 ¶ 25 (2003) (failure to comply with a merger condition is unjust and unreasonable), vacated on other grounds, *SBC Commc'ns, Inc.* v. *FCC*, 407 F.3d 1223 (D.C. Cir. 2005).

c. Petitioner and AT&T recognize the difficulties posed by their interpretation of Section 201(b), but insist that there are other adequate avenues of enforcement at least of carriers' payphone compensation obligations. Pet. Br. 17-18; see

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[5] By providing for coextensive judicial and administrative remedies in Section 207, Congress necessarily rejected petitioner's argument (Br. 41) that a private action for violation of Section 201(b) would vest the primary role in interpreting the Communications Act in the judiciary rather than the FCC. As long as courts entertaining actions under Section 207 properly defer to the FCC's substantive interpretation of the statute (and invoke the doctrine of primary jurisdiction where appropriate), there is no reason to think the courts will usurp the FCC's primary role. See *Brand X*, 125 S. Ct. at 2700-2701.

AT&T Br. 15-16. They argue that the FCC can collect fines or forfeitures under 47 U.S.C. 502-503. Those provisions, however, apply only to violations that are "willful[] and knowing[]." 47 U.S.C. 502. Proof of such intent-based standards is not always available, and forgiving carriers' compensation obligations in the absence of such proof would be at war with Congress's intent to ensure compensation "for *each and every*" completed call. 47 U.S.C. 276(b)(1)(A) (emphasis added). Even where the "willful[] and knowing[]" standard can be satisfied, moreover, fines and forfeitures under Sections 502 and 503 would go to the United States Treasury, not to payphone providers (or other victims of unjust practices). See 47 U.S.C. 503(b)(1)(A). It was thus "reasonable for the FCC to conclude that Congress would not have intended to grant PSPs an entitlement to compensation and to give the Commission broad authority to establish a mechanism to provide that compensation, but simultaneously to limit the enforcement of the statute and implementing regulations to the imposition of civil penalties." Pet. App. 20a-21a.

Petitioner also argues (Br. 17-18) that Section 276, combined with 47 U.S.C. 154(i), which grants the FCC authority to take action that is "necessary in the execution of its functions," permits the FCC to craft an enforcement procedure specific to payphone compensation. Although such a regime might be permissible, it is far from clear that Section 154(i) provides the authority that petitioner assumes. See, *e.g.*, *Motion Picture Ass'n of Am., Inc.* v. *FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (striking down an FCC rule promulgated pursuant to Section 154(i)); *American Library Ass'n* v. *FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005) ("ancillary jurisdiction" of FCC under Section 154(i) is "constrained"). In particular, those opposing such an FCC-crafted procedure would no doubt argue that Congress would not have intended to allow the FCC to create an administrative remedy that parallels the

already existing mechanisms under Sections 206-208 if those statutes themselves deny administrative relief.[6]

D. Petitioner's Argument That Failure To Pay Compensation Is Not A "Practice" Under Section 201(b) Is Wrong

Petitioner argues that an IXC's failure to pay compensation to a PSP is "not * * * a communications 'practice' covered by section 201(b)," because Section 201(b) "regulates carriers' relationships only with customers who request communications service." Pet. Br. 37. In petitioner's view, because the PSP is not the "customer" of an IXC when a dial-around call is made, an IXC's failure to pay the PSP for the call cannot be prohibited by Section 201(b). Petitioner's contention that the plain language of Section 201(b) must be read to contain an implicit limitation to carrier-customer relationships—a limitation that Congress chose not to enact—is mistaken. In addition, petitioner's argument is based on a mischaracterization of the relationship between a PSP and an IXC.

1. Section 201(b) was deliberately drawn in broad terms to address the wide variety of problems that may arise in the complex field of communications. Its requirement of just and reasonable behavior thus applies to *all* charges and practices, both "for" *and* "in connection with" interstate communications services. As the D.C. Circuit has recognized, the "generality" of the language of Section 201(b) "opens a rather large area for the free play of agency discretion." *Bell Atlantic Tel. Cos.* v. *FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996).

The Commission has previously found violations of Section 201(b) even when the complainant was not a customer of the

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[6] Petitioner claims that the FCC has "already established detailed procedures that allow payphone service providers to seek administrative resolutions of disputes just like this one." Pet. Br. 18; see Sprint Br. 9. But those procedures are simply ordinary complaint procedures under Section 208, which (like Section 207) are limited to violations of the Act itself. See 47 U.S.C. 208(a); 47 C.F.R. 1.719 (rules for FCC complaint procedures).

carrier. *Ascom Commc'ns, Inc.* v. *Sprint Commc'ns Co.*, 15 F.C.C.R. 3223, 3227 ¶ 9 (2000) (attempt by carrier to charge PSP for "calls for which Ascom was not a customer"); *AT&T* v. *MCI*, 9 F.C.C.R. 2688 (Common Carrier Bureau 1994) (in Section 208 damage action, finding violation of Section 201(b) when one IXC claimed another IXC violated FCC rule governing agreements with foreign telephone carriers). Indeed, as the latter decision illustrates, both Section 201(a) and Section 201(b) may govern the relationship between carriers, not merely between a carrier and its ultimate retail customers. Because Section 201(b) clearly applies to a carrier that purchases services from another carrier, it would be odd if it did not provide reciprocal coverage to the carrier providing the service when the purchasing carrier engages in unjust and unreasonable conduct. The court of appeals was thus correct in holding that the "practices" addressed by Section 201(b) are not limited by customer relationships. The statute "is ambiguous enough that unjust or unreasonable practices can encompass a broad range of activities related to the services provided and rates charged by a long distance carrier." Pet. App. 17a.

In *Louisiana Public Service Commission* v. *FCC*, 476 U.S. 355, 371-372 (1986), this Court rejected an argument analogous to the one raised here. AT&T and the local exchange companies argued, as they do here, that the terms "charges," "classifications," "practices," and "regulations" used in 47 U.S.C. 152(b) did not cover carriers' depreciation practices because bookkeeping practices did not relate directly to customer relationships. The Court "reject[ed] this narrow reading" of the statute and held instead that the terms should be given more generally accepted meanings. 476 U.S. at 371. Common carriers, such as petitioner, that are subject to the strictures of Section 201(b), surely would prefer the narrowest reading of that provision. But if Congress had intended to

limit the scope of Section 201(b) to customer relationships expressed in a carrier's tariffs, it would have either said so directly or simply included the "just and reasonable" requirement in the Section 203 tariff provisions, rather than placing the requirement in a stand-alone section, thus suggesting a broader scope of application.[7]

2. In any event, petitioner oversimplifies (Br. 37) the relationship between a PSP and an IXC. To be sure, in a dial-around context, the PSP is not a "customer" of the IXC in the sense of paying a fee to the IXC for a service, but neither is the PSP a single "supplier[]," comparable to a supplier of equipment or business supplies, from which the IXC "purchases inputs." AT&T Br. 5. The substance of the relationship between the PSP and the IXC bears a close similarity to the relationships between carriers and between carrier and customer clearly governed by the Act. For example, when, outside the dial-around context, a PSP independently contracts with an IXC to be the PSP's default long-distance carrier, the PSP could collect from the caller and remit a portion of the proceeds to the IXC, or the IXC could collect from the customer and remit a portion to the PSP. Depending on the precise arrangement, it could thus be said that the IXC is a "customer" of the PSP, purchasing access to the caller, or the PSP is a "customer" of the IXC, purchasing long distance services. Whichever way the funds flow, either the PSP or the IXC in substance could be viewed as the customer of the other.

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[7] AT&T argues (Br. 8-11) that other nearby provisions in the Communications Act apply only to carriers' relationships with their customers, and that Section 201(b) should be similarly limited. But those provisions are limited to to carrier-customer relationships only because Congress included additional terms in those provisions, not present in Section 201(b), that had that effect. Those terms were not superfluous, and their absence in Section 201(b) dooms AT&T's argument.

Similarly here, although the flow of funds goes from the IXC to the PSP under the FCC's rules (and under Congress's effective preclusion of a "caller pays" approach), the IXC-PSP relationship is closely analogous to the core relationships that would be governed by Section 201(b) even under the narrowest reasonable construction of that provision. Indeed, Congress forced the PSP into the relationship with the IXC because 47 U.S.C. 227(c)(1)(B) prohibits a PSP from blocking a customer's access to any long distance carrier. Insofar as this Court's decision construing the Interstate Commerce Act in *Missouri Pacific* applies to the Communications Act (see Pet. Br. 40), it confirms that result; in the terms of *Missouri Pacific*, the IXC's relationship with the PSP does not "differ widely in kind from the subject covered by" Section 201(b), and it "reasonably may be thought similar to or classified with the regulation of" carrier relationships covered by the Communications Act. 283 U.S. at 257.[8]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[8] Petitioner also contends (Br. 37) that because Section 201(b) applies only to interstate and international calls, but Section 276 applies to all calls, including intrastate calls, there is a "jurisdictional disconnect" between the two statutes that demonstrates that Section 201(b) cannot apply to a carrier's failure to pay dial-around compensation. That claim (which has never been raised before and was not addressed below) is illogical: even if Section 276 may cover a broader territory than Section 201(b), that does not mean that the two provisions cannot apply to some of the same activities. At most, if it were possible to separate interstate and intrastate calls, any jurisdictional limitation in Section 201(b) would limit respondent's recovery in its federal cause of action to compensation for interstate calls. In any event, the district court may exercise pendent jurisdiction to allow a PSP to recover for intrastate calls under state law, as the court of appeals held respondent could do in this case. Pet. App. 30a-36a. To the extent that any state law is inconsistent with the requirements of Section 276 as implemented by the FCC, the FCC's regulations "shall preempt such State requirements." 47 U.S.C. 276(c).

Respectfully submitted.

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STATUTORY AND REGULATORY APPENDIX

1. 47 U.S.C. 201 provides:

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: Provided, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: Provided further, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this chapter or in any other provision of law shall prevent

a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

2. 47 U.S.C. 206 provides:

§ 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

3. 47 U.S.C. 207 provides:

§ 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

4. 47 U.S.C. 208 provides:

§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

(a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

5. 47 U.S.C. 226 provides, in relevant part:

§ 226. Telephone operator services

* * * * *

(c) Requirements for aggregators

(1) In general

Each aggregator, beginning not later than 90 days after October 17, 1990, shall—

* * * * *

(C) ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

* * * * *

(e) Separate rulemaking on access and compensation

* * * * *

(2) Compensation

The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones. Within 9 months after October 17, 1990, the Commission shall reach a final decision on whether to prescribe such compensation.

* * * * *

6. 47 U.S.C. 276 provides, in relevant part:

§ 276. Provision of payphone service

(a) Nondiscrimination safeguards

After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service—

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

(b) Regulations

(1) Contents of regulations

In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after February 8, 1996, the Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that—

(A) establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on February 8, 1996, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A);

* * * * *

7. 47 C.F.R. 64.1300 provides:

§ 64.1300 Payphone compensation obligation.

(a) For purposes of this subpart, a Completing Carrier is a long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call or a local exchange carrier that completes a local, coinless access code or subscriber toll-free payphone call.

(b) Except as provided herein, a Completing Carrier that completes a coinless access code or subscriber toll-free payphone call from a switch that the Completing Carrier either owns or leases shall compensate the payphone service provider for that call at a rate agreed upon by the parties by contract.

(c) The compensation obligation set forth herein shall not apply to calls to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or local calls for which the caller has made the required coin deposit.

(d) In the absence of an agreement as required by paragraph (b) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of $.494.